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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LINDA TIERNO, Plaintiff and Appellant, v. FOUNTAIN VALLEY REGIONAL HOSPITAL AND MEDICAL CENTER et al., Defendants and Respondents.	G055200 (Super. Ct. No. 30-2015-00825274) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Linda S. Marks, Judge. Affirmed.

Linda Tierno, in pro. per., for Plaintiff and Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker and Vicent D'Angelo for Defendant and Respondent Sarabjit Sandhu.

La Follette, Johnson, De Haas, Fesler & Ames, Kimberly D. Snow and Robert J. Iacopino for Defendant and Respondent Sandeep S. Dang.

Murchison & Cumming and David A. Winkle for Defendants and Respondents Fountain Valley Regional Hospital and Medical Center, Kathy Neves and Nancy Sawyer.

Doyle, Schafer McMahon, Terrence J. Schafer and Nazanin Houshyar for Defendant and Respondent Sujata Lalla-Reddy.

* * *

Plaintiff Linda Tierno appeals from a judgment in favor of defendants Fountain Valley Regional Hospital and Medical Center (the Hospital), Kathy Neves, Nancy Sawyer, Sarabjit Sandhu, Sandeep S. Dang, and Sujata Lalla-Reddy (collectively defendants) following the court's decision to grant defendants' summary judgment motions pursuant to Code of Civil Procedure section 437c.[1] Tierno, who filed no opposition papers, argues the court should have continued the motions due to her medical condition or denied the motions on the merits. We conclude her continuance requests were untimely and failed to meet statutory requirements. We further find that defendants met their burden to justify summary judgment and that Tierno's posttrial motions were properly denied. We also reject Tierno's claims of judicial bias and her assertion that she was wrongfully ordered to pay $900 in discovery sanctions. The judgment is affirmed.

I

FACTS

A. Scope and Structure of this Opinion

Tierno's opening brief purports to offer 17 different arguments. Many of these overlap, so in the interest of brevity, we have grouped them into several categories

[1] All further undesignated statutory references are to the Code of Civil Procedure.

– the timing of the hearing on the summary judgment motions, purported judicial bias, the propriety of granting the summary judgment motions, Tierno's posttrial motions, and her appeal of the discovery sanctions. To the extent she offers arguments that are not pertinent to these issues, they are not properly before us and we disregard them.[2]

We also disregard any arguments and facts that Tierno raises for the first time in her reply brief. This is a breach of a fundamental precept of appellate procedure. (*Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 108-109.)

B. Factual Background

"Because this case comes before us after the trial court denied a motion for summary judgment, we take the facts from the record before the trial court when it ruled on that motion." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1034-1035.)

On September 12, 2014, Tierno, who was 53 years old at the time, arrived at the Hospital, complaining of abdominal pain, nausea, and vomiting. She was seen in the emergency room and identified Sulfa, Tetracycline, Amoxicillin, and alcohol as allergies. She reported seizures following alcohol consumption and hives upon taking Amoxicillin or Sulfa. Lalla-Reddy was contacted about Tierno by the treating emergency room physician on the evening of September 12.

Tierno signed a medical and surgical consent form. A CT scan of her abdomen was performed, "and was interpreted as showing bilateral nonobstructing renal

[2] Tierno argues, for example, that the medical profession has "built in advantages" in medical malpractice cases, due to the cap on noneconomic damages imposed by the Medical Injury Compensation Reform Act (MICRA; Civ. Code, § 3333.2), which in turn make it difficult to find counsel willing to take a case on a contingent fee basis. She may or may not be correct, but that is not a situation this court can remedy or even consider. MICRA is settled law in California. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

calculus, left ureterovesicular calculus 0.4 cm with left mild hydronephrosis and probable peripelvic urinoma." Blood tests showed an elevated white blood count. She was administered several medications in the emergency department, including Dilaudid, Reglan, and Toradol.[3] Although she initially refused, she eventually consented to being given Zofran for treatment of nausea.

She was initially diagnosed with "Renal Colic-Acute Obstruction" (which appears to be kidney stones) and was admitted to the Hospital under the care of Lalla-Reddy. At the time, Tierno reported that she had been under the care of multiple physicians for various ailments. Lalla-Reddy confirmed her reported allergies.

Dang, a nephrologist, consulted on the case at Lalla-Reddy's request. He recommended continuing the treatment to assess Tierno's response to antibiotics with possible stent placement. He noted the same allergies as the previous doctors. His assessment was "acute kidney injury, nephrolithiasis, left ureteropelvic junction stone of 4 mm with hydronephrosis, questionable urinoma, hypernatremia, leukocytosis with urinary tract infection, anemia, with microcytosis, possible bowel ischemia." Dang recommended "vigorous IV fluids and antibiotics, specifically Levaquin," in addition to other tests and medications. Tierno initially refused Levaquin and one of her other medications, for fear of having an allergic reaction, although she did not have a history of allergies to either medication.

Lalla-Reddy spoke with Tierno about her refusal to take the prescribed medication. Lalla-Reddy spoke with Tierno about why she needed to be treated, and went through the test results with her. Tierno looked at the results herself and questioned part of the diagnosis. Lalla-Reddy observed that Tierno appeared to be hyper-focused on

[3] Dilaudid is used to treat pain (<https://www.rxlist.com/dilaudid-drug.htm> [as of April 10, 2019]); Toradol is an anti-inflammatory (<https://www.rxlist.com/toradol-drug.htm> [as of April 10, 2019]); and Reglan is apparently used primarily for gastrointestinal ailments (<https://www.rxlist.com/reglan-drug.htm> [as of April 10, 2019]).

the side effects. She continued to refuse, indicating she wanted only cranberry juice, which she believed would solve her problem. Tierno was noted as "quite aggressive and argumentative." Whenever Lalla-Reddy would reassure her about one concern, Tierno would raise something else she had read somewhere. Lalla-Reddy eventually asked the charge nurse to speak to the patient and to contact the Hospital's social services to see if Tierno's concerns could be resolved. At one point, Tierno decided she wished to sign out of the Hospital against medical advice, but then decided she wanted to file a complaint first, which she eventually did.

Tierno was eventually provided with, and read, three pages of information about Levaquin, including warnings and side effects, before agreeing to take the medication. The medication was eventually administered on September 14 and 15. Tierno claims she began having "painful reactions" on September 14. Nursing records indicated that Tierno complained about the intravenous device (IV) on September 15, and at the time, she was receiving magnesium sulfate and potassium chloride. The nurse decreased the profusion rate which helped alleviate the problem.

Lalla-Reddy had asked Sandhu, a psychiatrist, to evaluate Tierno about her concerns with her medical care. Lalla-Reddy was concerned about possible paranoia, insecurity and distrust of medical care. On September 15, Sandhu conducted a psychiatric assessment of Tierno, and he opined that Tierno had a depressive disorder. Dang also saw Tierno on September 15, and noted she was alert and in no apparent distress.

On September 16, Sawyer, a nurse, administered another dose of Levaquin pursuant to Dang's order. There is no evidence that Neves, the other nurse named as a defendant, ever provided Tierno with any care.

When Dang saw Tierno on September 16, he noted her left arm was tingling from the potassium infusion. It was noted that Lalla-Reddy's visits with Tierno continued to be difficult, with Tierno remaining fixed in her opinion that Lalla-Reddy did

not do anything for her. She had numerous complaints on September 17, including pain that was first in her back, then her groin, then her chest. She believed all of these were related to Levaquin. The social worker's notes indicated Tierno believed she had "pissed off" Lalla-Reddy, who had behaved unprofessionally towards her. Further, nobody had taken her complaints seriously. Despite records to the contrary, she claimed no doctor had examined her during her stay.

On September 17, Tierno was discharged with instructions to take Levaquin orally. She claimed that as a result of being prescribed the Levaquin, she developed peripheral neuropathy, or nerve pain. In July 2015, Duke Phan, M.D., performed nerve conduction studies on Tierno "and determined that the studies revealed no evidence of peripheral neuropathy, ulnar neuropathy, carpel tunnel syndrome, or any significant lumbar or cervical radiculopathy in the three upper and lower limbs tested."

C. Relevant Procedural History

Tierno filed the instant lawsuit on December 14, 2015, and filed an amended complaint on March 11, 2016. The first amended complaint (the complaint) set forth six causes of action, all related to the lead cause of action for medical malpractice (many of these other causes of action were dismissed through challenges to the pleadings).[4] Although Tierno claims this is a "complex case," the trial court never designated it as such. Indeed, we do not find that such a designation would have been warranted.

Generally, a plaintiff may begin requesting written discovery as early as 10 days after service of summons upon, or the first appearance by, an opposing party. (§§ 2030.020, subd. (b) [interrogatories], 2031.010, subd. (b) [documents], 2033.020, subd. (b) [requests for admission].) Accordingly, Tierno could have begun propounding

[4] By the time of the summary judgment motion, for example, the only claim remaining against the Hospital, Sawyer, and Neves was medical malpractice.

written discovery by no later than April 2016. She did not do so. In November 2016, the court advised Tierno "that she may conduct discovery immediately," and was not required to wait for the outcome of motions pending at the time.

The Hospital did begin serving discovery early on, and requested documents from Tierno in May 2016. She was granted various extensions, and responded in August. In response to numerous requests, Tierno responded that she "may have" responsive documents, "but their location is unknown or . . . unavailable presently." In response, the Hospital's counsel sent a meet and confer letter stating that a response that she "may have" such documents is noncompliant with discovery obligations, and requested supplemental responses within 10 days. In response, Tierno sent an e-mail stating that "I do not know if I have or have not any other documents in my possession so I cannot state if I do or do not have anything else so your request to withdraw my statement I 'may have' is unreasonable." She stated that she would continue "diligently searching" and supplement when any further documents were located. She did not provide a legal argument supporting her claim that the Hospital's request was unreasonable.

The Hospital sent another meet and confer letter explaining, at some length, the legal basis for its request. Counsel also advised Tierno that the absence of an adequate supplemental response specifying that she did or did not have responsive documents would lead to a motion to compel. The letter reminded Tierno that she was required to certify that she had made a diligent search and state her reasons if she could not comply with the production request.

Tierno responded with another e-mail stating her belief that she was in compliance with the relevant law and demanding that the Hospital provide a statute or case law reference to demonstrate that her use of "may have" in reference to responsive documents was inadequate.

Accordingly, the Hospital filed a motion to compel further responses and sought $1,950.00 in discovery sanctions. The sanctions request reflected seven hours of attorney time on meet and confer efforts and the motion itself. The Hospital argued that the responses were incomplete and evasive. Tierno argued in response that the Hospital should be sanctioned because it had not met and conferred in good faith.

While the discovery motion was pending, the defendants began filing motions for summary judgment. Dang and Sandhu filed on December 8, 2016, the Hospital filed on December 19, Neves and Sawyer filed on December 22, and Lalla-Reddy filed on December 23. In sum, the summary judgment motions argued that the expert testimony offered in declarations attached to the motions established that they did not breach the standard of care or cause Tierno's alleged injuries.

At a hearing on December 16, the court granted the Hospital's motion to compel and imposed $900 in discovery sanctions. The court also noted the pendency of numerous summary judgment motions, and set a hearing on all such motions for April 17, 2017, as well as any additional summary judgment motions that were timely filed. That date was more than four months after the first motion was filed, with notice of the motions provided to Tierno well in excess of the 75 days required by the statute. (§ 437c, subd. (a)(2).) Under section 437c, subdivision (b)(2), Tierno had until 14 days before the hearing, or April 3, 2017, to file her opposition and related documents.

In January 2017, Tierno filed an ex parte application to stay enforcement of the sanctions order pending a motion to "set aside and void order re fraud." Tierno attempted to directly challenge the court's basis for its ruling, arguing the Hospital had not fully answered the court's questions at the hearing on the motion, among other things, and seeking to relitigate the meet and confer issue, whether she had complied with discovery, and the Hospital's alleged bad faith.

At a hearing on January 23, 2017, the court addressed both Tierno's ex parte application on the discovery motion and the pending summary judgment

motions. The court did not grant the ex parte application, but directed the matter to be set for hearing as a noticed motion on April 17, the same day as the summary judgment motions, and a briefing schedule was set. At this same hearing, Tierno was directed to serve any written discovery by February 27, with defendants responding within 30 days of receipt. Tierno propounded considerable written discovery thereafter, and defendants provided timely responses.

The April 3 deadline for Tierno's response to the summary judgment motions came and went. On April 4, Tierno filed an ex parte application for an order to stay proceedings due to "complications re a medical disability and continuance of all calendared matters in the interest of justice." She asserted, in turn, that she was "disabled by . . . [d]efendant[s]" which had made it "impossible . . . to prosecute her case without a reprieve from the exhausting work that she has accomplished in record time without the assistance of counsel with expertise in these matter[s]"; that "[t]he complexity of this most complex type of civil cases, among the many types, has exacted extreme work ethic from her . . ." and that defendants and their counsel "have attempted to weigh her down with hundreds of forms of written discovery requests" and that she was "forced to do the impossible by completing discovery on all defendants [in] a little over a month from the last hearing."

She further asserted that given the type of case, the court should have expected it would take up to five years to conclude, and that her status as a self-represented litigant "is supposed to be taken into consideration by any just court interest[ed] in the dispensing of justice." Tierno argued that she could not both receive the discovery she was expecting and prepare responses to the summary judgment motions, and that she was under "legal assault." She claimed that she should be granted more time and the court would abuse its discretion by not granting her request. She believed the case was "farther ahead on schedule than could have ever been possibly imaginable given what and whom she has been up against."

Tierno's accompanying declaration stated she was "physically exhausted" and "suffering from attack [of] my nervous system which effects every aspect of my physical, mental, and emotional health." She stated that it was impossible to respond to the summary judgment motions because "I was forced to complete discovery in only a little over a month after the Court issued its order, in order for me to do so." She did not state that she had retained an expert witness, however. There was no medical evidence or documentation attached to the application.

Defendants promptly responded, opposing the application on the grounds that there was no good cause shown for a stay, the application was untimely, and that Tierno had not demonstrated further discovery was needed to find evidence to support her opposition. The court denied the application after considering the arguments of both parties. Tierno did not file a late opposition.

At the hearing on April 17, Tierno did not appear. The court advised defendants' counsel that it had "received this morning a rather voluminous packet of materials from the plaintiff" requesting, once again, a continuance of the hearing. The packet included a letter from Tierno stating a medical emergency had arisen (presumably on April 12, which was the date of the letter, although it was not clear), and that Tierno was "incapacitated." She complained repeatedly about the "2000 pages of discovery exchanged to date" as being incredibly burdensome and difficult to manage. In a postscript to the letter, she stated she had been "to emergency and has since been diagnosed with kidney stones (chronic ailment) as well." Attached to this letter were numerous, apparently unfiled, ex parte applications with unsigned declarations. Also attached was a handwritten, and mostly illegible, medical report from Huntington Beach Urgent Care dated April 3, noting that the patient stated she had nausea and nerve pain. There was also a note written on a prescription pad from a physician dated April 10, stating that due to her "significant fatigue, confusion and right arm pain, I feel that

she will require some time, perhaps 90 days, to recover sufficiently to be able to proceed with her legal case."

The court reviewed these documents and noted that Tierno, as a self-represented litigant, had a "Herculean task" in attempting to navigate the case, but at the same time, the court was bound by statute to hear motions in a timely manner. Further, the defendants, too, had a right to have their day in court and have litigation concluded in a timely manner. The court noted that the initial ex parte application did not specify Tierno's condition and was unsupported by medical records. The more recent packet included the brief doctor's note. Given those facts and the dates on calendar for trial and a mandatory settlement conference, the court treated Tierno's packet as a renewed request for a continuance under section 437c, subdivision (h). Ultimately, the court noted the request was untimely and did not meet the statutory requirements. "So while I recognize that continuances are discretionary with[] the court, and the court recognizes that Ms. Tierno has a medical condition which may impact her ability to prosecute her case, the more compelling feature and issue for the court is the fact that at no time has Ms. Tierno clearly articulated for the court what further discovery she is intending to engage in to properly oppose the motion for summary judgment. [¶] She has not requested more time from the court with regard to retaining any experts in this case. In fact, she has never mentioned in any of her moving papers that this court has reviewed or oral argument she has made to the court that she intends to retain an expert." Accordingly, the court denied the motion to continue the summary judgment hearing. Further, given Tierno's continued failure to retain an expert, the court found it was unlikely that further discovery would help her defeat summary judgment.

With respect to the motions themselves, the court found that defendants had met their burden to establish they were entitled to judgment as a matter of law, and granted their motions for summary judgment. "Because [the Hospital] met its initial burden, the burden shifted to plaintiff to proffer admissible evidence sufficient to

establish a triable issue of fact. Plaintiff made no effort to meet that burden. Therefore, [the Hospital] is entitled to summary judgment as to plaintiff's claim against it." Similar findings were made as to the individual defendants.

The court also denied Tierno's motion to set aside the $900 in discovery sanctions. Treating the motion as one for reconsideration, the court found it was untimely and not supported by new facts or law.

Thereafter, Tierno made two posttrial motions: for a new trial, and to vacate or set aside the judgment. The motions were not heard together, as we will discuss in more detail below. The trial court ultimately denied the motion for new trial, but the record did not address the motion to set aside the judgment. She now appeals.

II

DISCUSSION

A. Hearing on Summary Judgment Motions

In a number of different ways, Tierno argues the court should have delayed the hearing on the summary judgment motion due to her medical condition. Tierno requested such a continuance twice.

Section 437c, subdivision (h), states: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just."

"The statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under section 437c, subdivision (h).

[Citations.] Thus, in the absence of an affidavit that requires a continuance under section 437c, subdivision (h), we review the trial court's denial of appellant's request for a continuance for abuse of discretion." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254.)

Tierno's affidavits did not require a continuance under the statute. Her first request was on the day after her opposition was due via ex parte application, her second was dated April 12 and file-stamped April 14. We begin by noting that both applications were untimely. Under section 437c, subdivision (h), an application to continue a motion for summary judgment must be filed "on or before" the date the opposition is due. Just as importantly, Tierno did not offer any reason as to *why* the requests were not timely. If she was suddenly taken ill around April 3, that does not explain why she had not been working on her opposition and supporting documents since December, when she received notice of the motions.

Her continuing complaint was that she had too much discovery that required her attention, but this rings hollow. She could have begun seeking discovery from the defendants by no later than April 2016, and she offers no reason why she did not do so. When asked at oral argument, she stated she engaged in discovery early in the case by responding to the defendants' requests, but she seems to have missed the point that discovery routinely takes place simultaneously, with both parties propounding and responding to discovery at the same time.

Tierno was advised by the court in November that she could conduct discovery immediately, but it took an outright order in January 2017 for her to finally begin the process of propounding any discovery to defendants. She has never, here or in the trial court, made any proffer as to why she did not start discovery far earlier, and any time crunch that she ran into after the summary judgment motions were filed was entirely of her own making.

Further, despite her complaints to the contrary, there is no showing that defendants attempted to bury her in either answering their discovery or by over-producing documents. She stated in her April 2017 letter that overall production of documents exceeded 2000 pages, and could double in number before discovery was concluded. But even 4000 pages of documents is neither particularly voluminous or unusual in this type of case, and again, it would have been easier to manage had Tierno begun the process earlier. In sum, we find that the court could properly have denied the continuance requests based on their untimeliness alone under section 437c, subdivision (h).

Denying the requests on the merits was also appropriate. For a continuance to be required under the statute, the moving party must demonstrate "that facts essential to justify opposition may exist but cannot, for reasons stated, be presented" (§ 437c, subd. (h)) at that time. At no point did Tierno's ex parte applications specify what facts existed or why they could not be presented at that time. It is not enough, under the statute, to merely hypothesize that further discovery is needed. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 397.) Tierno did not meet the statutory requirements in either of her applications, which were properly denied on that basis.

To the extent Tierno argues we should consider her requests as seeking to stay the entire proceeding, we treat this as a nonstatutory request for a continuance. When a party fails to meet the requirements of section 437c, subdivision (h), the trial court may, in its discretion, grant a continuance upon a showing of good cause. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 714.) We review this determination for abuse of discretion. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 ["'"'"Generally, power to determine when a continuance should be granted is within the discretion of the court, and there is no right to a continuance as a matter of law'"'"].)

"'The death or serious illness of a trial attorney or a party "should, under normal circumstances, be considered good cause for granting the continuance of a trial date[.]" [Citation.]' [Citation.] Likewise, it is good cause for granting the continuance of a summary judgment motion." (*Lerma v. County of Orange*, *supra*, 120 Cal.App.4th at p. 717.) But Tierno failed to establish that "serious illness" was the cause of her failure to submit any written opposition to the summary judgment motions. The April 4 ex parte attached no medical documentation establishing she was unable to respond to the summary judgment motions since the date they were served. Indeed, medical issues did not seem to be the primary reasoning behind the April 4 ex parte, which focused on Tierno's problems completing discovery.

The packet the court reviewed on the hearing date did not establish good cause for Tierno's previous failure to submit a written response either. The only medical documentation was a short handwritten note from a physician,[5] who described her as currently suffering from "significant fatigue, confusion and right arm pain," but did not provide any information as to date of onset. It is not attendance at the hearing that was determinative here, but Tierno's failure to provide *any* written opposition whatsoever that determined the outcome of the summary judgment motions. Based on the information Tierno provided to the trial court, we cannot conclude the court abused its discretion in denying a nonstatutory continuance of the hearing on the motions.

B. Judicial Bias

Sprinkled throughout Tierno's briefs are accusations of judicial bias. Tierno argues the trial judge was biased against her because of her alleged poor health and her status as a self-represented litigant. This is a serious accusation that should never be made without evidence or in an attempt to gain the upper hand in litigation.

[5] Tierno's relationship with this physician was unclear; we do not know whether this was Tierno's regular treating physician, or a doctor she saw once.

The standard for judicial bias is whether a reasonable person would doubt the court's impartiality. (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 262, disapproved on other grounds by *People v. Freeman* (2010) 47 Cal.4th 993, 1006, fn. 4.) As far as we can tell, Tierno did not raise the issue of bias in the trial court. Although bias and prejudice are grounds for disqualification of trial judges (§ 170.1, subd. (a)(6)), Tierno does not argue that she attempted to avail herself of any disqualification procedure.

Tierno claims that "a formula" exists when considering summary judgment motions, where the plaintiff, overwhelmed by discovery, will abandon the case. Judges, she claims, are complicit in this. She claims the court "knowingly made an order so ['the formula'] worked on the Plaintiff." She refers to the court's January 23, 2017 order which directed plaintiff to propound any written discovery no later than February 27. As we have already discussed with respect to the timing of the summary judgment motion, this was not improper in any respect. Nothing stopped Tierno from propounding her discovery months earlier. Reminding Tierno that she needed to get her written discovery propounded was not a reflection of bias or prejudice; indeed, it was the opposite – it reflected the court bending over backward to make sure a self-represented litigant still had time to complete necessary tasks.

Tierno next claims that the court both ignored and actively discriminated against her because of a "disability"[6] and ruled against her because of it. She claims that the judge expressed impatience, cherry-picking isolated comments to support this contention, while ignoring that the record reflects that the court carefully considered her arguments. She provides no record citations demonstrating hostility or discriminatory animus based on her medical condition.

[6] The record does not reflect that Tierno has ever established that her alleged medical condition qualified as a "disability" within the legal meaning of the term, but we assume that it does for the sake of argument only.

Taken together or separately, there is no showing that the court was biased against Tierno. Indeed, when read in context and as a whole, the record reflects that the court carefully followed established procedure, and often went out of its way to clarify matters for Tierno. While the record shows occasional impatience, this does not come anywhere close to demonstrating bias or prejudice. Ideally, of course, no litigant or attorney would ever have to deal with a judge who lacked a perfect temperament. (We might add that in such an ideal world, no judge would ever have to deal with a less than perfect attorney or litigant.) But an occasional deviation from ideal temperament does not equate to bias, which is a serious charge. It devalues legitimate cases of bias when a party makes such an accusation on scant evidence such as that present here.

C. Propriety of Summary Judgment

1. Fundamentals of Summary Judgment and Standard of Review

Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).) To prevail on the motion, a defendant must demonstrate the plaintiff's cause of action has no merit. This requirement can be satisfied by showing either one or more elements of the cause of action cannot be established or that a complete defense exists. (§ 437c, subds. (o), (p); *Bardin v. Lockheed Aeronautical Systems Co.* (1999) 70 Cal.App.4th 494, 499-500.)

"[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) "There is a triable issue of

material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850, fn. omitted.)

Tierno argues that this court has authority to treat an appeal from a grant of summary judgment as a "trial de novo." This is not quite accurate. We review a trial court's decision de novo, which means we do not defer to the trial court and are not bound by the reasons in its summary judgment ruling; we review the ruling of the trial court, not its rationale. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) This review, however, is in the context of an appeal. We do not conduct a new trial. "'On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.'" (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813; see § 437c, subd. (c).)

In performing our review, we use the same procedure as the trial court. We first consider the pleadings to determine the elements of each cause of action. Then we review the motion to determine if it establishes facts, supported by admissible evidence, to justify judgment in favor of the moving party. Assuming this burden is met, we then look to the opposition and "decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.) We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

2. Moving Party's Burden

As noted above, the party moving for summary judgment has the "initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.)

In order to make this determination, we review the law and evidence relevant to the pleaded causes of action.

"""[I]n any medical malpractice action, the plaintiff must establish: '(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.'"""
(*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310.)

"Opinion testimony from a properly qualified witness is generally necessary to demonstrate the elements for medical malpractice claims." (*Borrayo v. Avery*, *supra*, 2 Cal.App.5th at p. 310.) "When a defendant health care practitioner moves for summary judgment and supports his motion with an expert declaration that his conduct met the community standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Ibid.*) Similarly, causation must also be proved through competent expert testimony. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118.)

Defendants each provided expert declarations in support of their summary judgment motions. The Hospital, Neves, and Sawyer relied on the declaration of Edwin C. Amos, III, M.D. Amos's declaration reviewed his own credentials and experience before discussing his extensive review of Tierno's medical records in this case. He opined that the Hospital, Neves, and Sawyer acted appropriately and satisfied the requisite standard of care for hospitals and nurses during Tierno's stay. He also concluded that neither the Hospital nor either nurse caused or contributed to the injuries Tierno alleged. The other defendants provided similar declarations by experts opining that they neither breached the standard of care nor caused any of the injuries alleged. Lalla-Reddy provided the declaration of Sohanjeet Bassi, M.D., Dang provided the declaration of Isaac Gorbaty, M.D., and Sandhu provided the declaration of Thomas K.

Ciesla, M.D. Accordingly, we find that each defendant met the burden necessary to establish they are entitled to summary judgment.

3. Responding Party's Burden

The burden then shifted to Tierno to demonstrate a triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) As noted above, however, Tierno never submitted a timely written opposition or separate statement. She now argues that triable issues of fact existed that should have prevented the court from granting summary judgment even without any opposition from her.

Tierno admits she never retained an expert witness. She claims this is an unfair requirement, and this court should discard this requirement because it violates due process. While we understand Tierno's opinion on the matter, as a matter of law, she is incorrect. As we discussed above, each cause of action has elements that must be proved to meet the standard necessary for summary judgment. The opposing party then must raise triable issues of material fact to defeat the motion. To prove there was no breach of the duty of care, defendants offered the testimony of an expert medical witness. By providing this evidence, they met their burden. The burden then shifted to Tierno to demonstrate, with evidence, triable issues of material fact. To do so, Tierno was required to offer the testimony of a medical witness who could so testify that triable issues existed. While this is undoubtedly a burdensome necessity, it is no less than Tierno would be required to offer at trial. It is not a violation of due process.

Tierno points to one page of diagnostic test results, conducted by Phan, that she claims shows "inconsistencies under Knee-Ankle twice." Again, without expert testimony to explain this test, which this court is not competent to interpret without specific medical guidance, we cannot find this creates a triable issue of material fact. Phan's ultimate conclusion from the tests, moreover, was that they did not show any evidence of peripheral or ulnar neuropathy.

Further, Tierno claims summary judgment should not have been granted because she "presented triable issues" in her complaint. But pleadings are not evidence. "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843.) Thus, an opposition to a summary judgment motion must be supported by evidence. Moreover, "[m]aterial not presented in opposition to the summary judgment motion itself is not properly considered by the court in ruling on the motion." (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1054.) By failing to submit any timely, written opposition to the motion, Tierno cannot now argue that triable issues of fact exist.

D. Motions for New Trial and to Vacate Judgment

Tierno next claims the court erred with respect to two posttrial motions. The first of these is her motion for new trial. "'A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. "'The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.'"'" (*Garcia v. Rehrig Internat., Inc.* (2002) 99 Cal.App.4th 869, 874.) If we find error, we then review the record independently to decide if the error was prejudicial. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872.)

Tierno first states that the court intentionally changed the date of the hearing on the motion for new trial so as to deprive her of the right to file a reply. Tierno does not indicate that she complained about the inability to file a reply brief any time before the hearing. The court explained the date of the motion was set because it had to be heard within the statutory period and by the same court that heard the motion.

If Tierno wished to contest this, the proper method was an ex parte motion promptly after the hearing date was first set on May 31, nearly four weeks before the motion was heard on June 27.

The only grounds for a new trial are statutory. (§ 657.) There are only two statutory reasons listed or suggested by Tierno in her new trial motion. The first ground is "Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." (§ 657, subd. (4).) The points and authorities supporting her motion, however, fail to state what the newly discovered evidence is, and further, Tierno did not indicate any such evidence during the hearing on the motion. She conceded she had still not retained an expert witness.

Tierno argues the court did not look at the "entire record," but that record, in this case, was the "trial record" – or the record of the summary judgment motion, not every document ever filed in the case in any context. She claims her declarations included new evidence, but offers no reason as to why such evidence could not have been produced earlier.

The second ground suggested by her motion was "[i]nsufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law." But her motion offered no substantive argument on this point, and neither did her presentation at the hearing. She failed to indicate where or why the evidence was insufficient. Accordingly, we find no error in the court's decision to deny her motion for new trial.

The second motion Tierno takes issue with was her motion to vacate the judgment. Tierno filed a notice of intent to file such a motion on May 30, 2017. According to Tierno, the computerized reservation system set this motion for August 21, which would be after the deadline set by section 663a for such motions. On June 16, Tierno filed an ex parte motion that can only be characterized as confusing. It was

entitled "application for order to continue hearings on motion for new trial and to set aside and vacate judgment and enter a new and different judgment and to reserve dates for discovery motions." (Capitalization omitted.) Tierno characterizes this as an attempt "to correct the court error of not advancing" the date, but this is not reflected by the record, which shows Tierno was requesting to "continue the hearings on my motions in the interests of justice." Nowhere does this motion or the supporting declaration specifically request the date of the motion to vacate be advanced. The court denied the motion.

On June 30, Tierno filed another ex parte motion which did request the court to advance the hearing date on the motion to vacate. Several defendants opposed, arguing the motion to vacate was based on the same grounds as the motion for new trial. The court ultimately denied the ex parte motion. Tierno filed her notice of appeal on July 12, well before the hearing date. The record does not indicate a final ruling on the motion itself, but we deem it denied.

We find no error. First, the motion itself was untimely served a day after the statutory deadline. This alone is grounds for denial. (§§ 659a, 663a.) Second, once Tierno filed the notice of appeal, the court did not have jurisdiction to hear the motion. Under section 916, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby." (See *Andrisani v. Saugus Colony Limited* (1992) 8 Cal.App.4th 517, 523.) A motion to vacate under section 663 does not fall within the limited exceptions to this general rule.

Even if these were not ample grounds on which to deny the motion, the motion was properly denied under any standard of review. Section 663 requires the moving party to demonstrate an "[i]ncorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts . . . ." Here, Tierno asked the court to vacate its decision on the summary judgment motions, but she had never submitted timely

written opposition to those motions, or even an untimely opposition. At the time she filed the motion to vacate, she still had not retained an expert witness who could rebut the evidence presented by defendants. Thus, given the evidence properly before the court, there was simply no method by which Tierno could have shown an "[i]ncorrect or erroneous legal basis for the decision . . . ." The court did not err by denying this motion.

Finally, even if we assume that the court erred by not specifically and explicitly ruling on the motion, we conclude this does not rise to the level of reversible error. Despite Tierno's claims to the contrary, there was no violation of equal protection or due process. First, given the untimely service and the jurisdictional issue, any error was harmless. Moreover, given that the motion to vacate was essentially the same in substance as the motion for new trial – indeed, large portions of both motions were identical – we conclude there is no reasonable possibility that the court would have ruled differently on the motion to vacate, and any error in not holding a hearing on the motion was, accordingly, harmless.

E. $900 in Discovery Sanctions

Tierno raises numerous issues with respect to the $900 in discovery sanctions the court imposed. We review an order imposing discovery sanctions for abuse of discretion. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.)

Tierno contends the court should not have imposed discovery sanctions on her, claiming that she established that the Hospital did not meet and confer in good faith. We disagree. The Hospital tried twice to explain Tierno's obligations to her, citing statutes, case law, and a readily accessible practice guide for reference. The Hospital was not, as Tierno apparently believes, under an obligation to answer her specific questions or conduct legal research on her behalf. Its obligation was to explain why it believed the

discovery responses were inadequate, and it did so clearly and at least twice. We find no abuse of discretion in the fact or amount of sanctions imposed by the trial court.

Tierno also argues that the court improperly interpreted her motion to set aside the sanctions order as a motion for reconsideration. She claims her motion was one under section 663 to "set aside" the order. But section 663 does not, by its plain language, apply to orders: "A *judgment or decree*, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court . . . ." (Italics added.) Tierno offers no authority that section 663 may be used to vacate an order for discovery sanctions. The only grounds upon which the court could consider this issue was as a motion for reconsideration, and as such, it was untimely. We find no error.

III

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.